IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

NAYLOR SENIOR CITIZENS HOUSING, LP; NAYLOR SENIOR CITIZENS HOUSING II, LP; Appellants, JOHN DILKS, Plaintiff	)	
vs.	)	**Case No: SD32098**
SIDES CONSTRUCTION COMPANY, INC.; CITY OF NAYLOR; SCHULTZ ENGINEERING SERVICES, INC.; NAYLOR RII PUBLIC SCHOOLS AND DILLE AND TRAXEL, LLC, Respondents.	)	

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This case involves a claim of damage to real property allegedly caused by negligence of three respondents and inverse condemnation by two other respondents. The appellants are two limited partnerships which owned the real estate. The appeal involves procedural issues, namely the effect of a non-lawyer signing a petition for the limited partnerships, and application and construction of a civil procedure rule. The case does not involve the validity of any treaty or statute of the United States or of a statute or provision of the Missouri Constitution. It does not involve the construction of the revenue laws of this state, title to any state office, or any criminal matters. Therefore appellate jurisdiction is in the Court of Appeals since none of the issues are within the exclusive jurisdiction of the Supreme Court as set out in Article V, Section 3, of the Missouri Constitution.

STATEMENT OF FACTS

Appellants are both limited partnerships. The general partner of each is John Dilks. As of September 22, 2006, both claimed to own land in the City of Naylor, Ripley County, Missouri. Appellants' petition alleged that during a period of heavy rainfall on or about September 22, 2006, surface water backed up and caused flood damage in excess of $25,000.00 to the business premises of both Appellants. Appellants claimed this flooding was caused by the action of Respondents, (lf, pages7-11).

Appellants' petition was signed by Plaintiff John Dilks who was alleged to be the general partner of both Appellants (lf, page 8). The signature line of the petition called him a "managing partner." (lf, page 11) Respondents each filed motions to dismiss the petition of Appellants because the petition was not signed by an attorney, (lf, pages12-13, 24-25,31,46, 48-51,53).

An affidavit of John Dilks was filed with the Court in response to the motions to dismiss (lf, pages 56-58). John Dilks swore that he was the general partner of both Appellants. He stated that he signed the petition and filed it based on instructions from a law firm which discovered that it had a conflict of interest and told him of this only one day before the petition was filed. He stated that he was also told by one of the attorneys in the firm that because the time for filing was almost up he should sign and file the petition personally. The petition was prepared and given to him by the same law firm. He denied being told that an attorney had to sign the petition. He stated that he did not have time to take the petition to another attorney to review before five years passed from when the flooding occurred (lf, pages56-58). He signed and filed the petition the following day, June 21, 2011 (lf, page 1).

briefed, (lf, pages 4-5). The Court first entered an "Order" on March 7, 2012 (lf, page 70). As to Appellants, the Court found that the petition was "a nullity and, as such, (h)as had no legal affect from the date of filing," (lf, page 70).

Appellants then filed their "Motion to Amend Order and Motion to Reconsider," (lf, pages 77-79). The Court never explicitly ruled that the statute of limitations had run as to any of the Appellants' claims. However, the Court did enter its "Partial Judgment" on May 2, 2012, (lf, page 98). It is that partial judgment from which this appeal is taken. This is allowed because the Court found there was no just reason for delay as to the partnership Plaintiffs. Appellants believe the facts as to events at the circuit court level are not disputed, and only issues of law are presented.

POINTS RELIED ON

I. The trial court erred in sustaining Respondents' motions to dismiss as to Appellants because the failure of Appellants to have their petition signed by an attorney did not make the petition a nullity and did not require dismissal. Case law is clear that the nullity rule has been or should be abandoned. The proper action is for the trial court to give the party who failed to properly sign the pleading an attempt to correct the omission.

II. The trial court erred in sustaining Respondents' motions to dismiss as to the limited partnerships because the signing of the petition by their general partner, not an attorney, did not amount to the practice of law under the facts of this case, and thus the petition was not a nullity, and the statute of limitations did not bar this suit. Case law to the contrary has been overruled by the Supreme Court.

POINT I

1. Rule 55.03 (a)
2. Glover v. State of Missouri, 225 S.W.3d 425 (Mo. banc 2007).
3. Hensel v. American Air Network, 189 S.W.3d 582 (Mo. banc 2006).
4. In re Estate of Conard, 272 S.W.3d 313 (Mo. App. 2008).

POINT II

1. Hensel v. American Air Network, 189 S.W.3d 582 (Mo. banc 2006).
2. Haggard v. Division of Employment Security, 238 S.W.3d 151.

ARGUMENT

STANDARD OF REVIEW.

"A motion to dismiss is an attack on the petition and solely a test of the adequacy of the pleadings." Rychnovsky v. Cole, 119 S.W.3d 204, 208 (Mo.App.W.D. 2003). Matters outside the pleadings were presented to and apparently considered by the trial court (see affidavit of John Dilks, lf pages 56-58), and thus the trial court treated the motion to dismiss as a motion for summary judgment. In such a case, the appellate review is de novo. ITT Commercial Finance v. Mid-Am Marine, 854 S.W.2d 371, 376 (Mo.banc 1993).

POINT RELIED ON NUMBER I. The trial court erred in sustaining Respondents' motions to dismiss as to Appellants because the failure of Appellants to have their petition signed by an attorney did not make the petition a nullity and did not require dismissal. Case law is clear that the nullity rule has been or should be abandoned. The proper action is for the trial court to give the party who failed to properly sign the pleading an attempt to correct the omission.

Rule 55.03 provides "(a) Signature Required. Every pleading... shall be signed by at least one attorney of record...or by the self-represented party... An unsigned filing...shall be stricken

unless the omission is corrected promptly after being called to the attention of the...party filing same." The petition in this case was signed by the general partner of Appellants who is not an attorney (lf, page 11). Respondent Schultz Engineering Services (Schultz), by motion to dismiss, called this omission to the attention of the trial court (lf, pages 12-13). Respondent, City of Naylor (City), next raised this issue by motion to dismiss (lf, page 24). It added an additional claim that because the general partner was not an attorney his action in signing and filing the petition on behalf of Appellants was a nullity (lf, pages 24-25). Respondent Sides Construction Company (Sides), by motion to dismiss, claimed that the failure to have the petition signed by an attorney justified "dismissal of the cause of action and treatment of the actions taken as a nullity" and "renders those pleadings void "(lf, page 31). Respondent Schultz then joined in Sides' response (lf, page 46), as did Respondent Dille & Traxel, LLC (Dille) (lf, pages 48-51). Finally, Respondent Naylor R-II Public Schools (School), joined in the response of Sides to Appellants' reply to the motions to dismiss (lf, page 53). In response to the various motions to dismiss Appellants attempted to correct the omission. They filed, by an attorney, their "Motion For Leave To File First Amended Petition and Proposed First Amended Petition"{lf, pages 59-66). The trial court never ruled on that motion. Instead the trial court entered the "Partial Judgment" (lf, page 98), from which this appeal is taken.

Rule 55.03(a) should have been dispositive of the issue raised by the improperly signed pleading. The motions to dismiss "called to the attention" of the Appellants the improper signature, as contemplated by Rule 55.03 (a). If the petition was unsigned the Rule, id, contemplates that it could be corrected. The correction would be to allow an attorney to sign the petition, or an amended petition, which is the relief Appellants requested.

In Glover v. State of Missouri, 225 S.W.3d 425 (Mo.banc 2007), the Supreme Court affirmed, on transfer, a decision of this Court. Glover had filed a post-conviction motion pursuant to Rule 29.15, but he failed to sign the motion. The state claimed that the failure to sign the motion was jurisdictional. When the omission was called to Glover's attention he promptly signed and filed the motion. However this was after the appeal was in process. The Supreme Court held that the signature requirement of Rule 29.15 was not jurisdictional and is subject to the sanctions of Rule 55.03. The Court also clarified that the correction of a signature omission should be permitted whether done before or after the time for filing an amended Rule 29.15 motion had expired, citing Tooley v. State, 20 S.W.3d 519, 520(Mo.banc 2000), and Wallingford v. State, 131 S.W.3d 781, 782(Mo.banc 2004). Glover, supra page 428.

To the same effect is the decision of the Supreme Court in Carter v. State, 181 S.W.3d 78, 79-80 (Mo.banc 2006), holding that where a movant did not sign his pro se Rule 29.15 motion, but did later sign his amended motion, after the time deadline, the motion court erred in dismissing the motion as untimely.

The Supreme Court in Glover, supra, also cited its decision in Hensel v. American Air Network, 189 S.W.3d 582, 583 (Mo.banc 2006), saying that "...the purpose of the signature requirement is not to deprive litigants of a right of action." In Hensel, id, an attorney not licensed in Missouri signed a petition for civil damages. A Missouri attorney filed the petition, but did not sign it, on the last day to file under the applicable statute of limitations. When the out-of-state attorney sought to be permitted to litigate the case in Missouri, the defendants filed motions for summary judgment, noting the lack of a valid signature. The trial court granted summary judgment for defendants and refused to allow the petition to be properly signed by interlineation.

The Supreme Court reasoned that if "the lack of signature is not necessarily fatal to the filing of a petition... a different rule should not apply to a petition not properly signed...." In reversing the trial court the Supreme Court stated, "Under these facts, the parties attempted to correct the omission promptly. That is all the rule requires when the court prevents the correction." (Id. at 583)

In 2008 the Western District decided In re Estate of Conard, 272 S.W.3d 313 (Mo.App. 2008). Three unsigned probate claims were filed. Eventually, the trial court dismissed the claims because they were unsigned as required by Section 473.380.1, RSMo. The Western District held that "Rule 55.03 (a) provides the enforcement mechanism for such a signature requirement...." (Conard, id. at 318). The claimants were allowed to sign amended claims after the lack of signatures were called to their attention. The trial court's judgment was reversed, and the Court of Appeals held that the "amendment of their original claims related back to that original filing and was timely and the...claims should not have been dismissed."(Id. at 321).

The Supreme Court has made it clear that the strict rules regarding the signing of pleadings have been relaxed. We have looked at examples in three types of civil cases where the lack of a signature, or an improper signature, was not cured until after a deadline. These involved a post-conviction deadline, Rule 29.15, a probate, nonclaim statute, Section 473.380.1,RSMo, and a one-year statute of limitations (see Hensel, supra, at page 582). In all of these, the Appellate Courts, relying on and interpreting Rule 55.03(a), have allowed the signature to be corrected and refused to dismiss the pleading in question. Whether the petition was unsigned, or improperly signed, as in Hensel, the Supreme Court has spoken clearly by saying that the proper sanction is to allow a party or attorney to correct the omission after it is called to their attention.

POINT RELIED ON NUMBER II. The trial court erred in sustaining Respondents' motions to dismiss as to the limited partnerships because the signing of the petition by their general partner, not an attorney, did not amount to the practice of law under the facts of this case, and thus the petition was not a nullity, and the statute of limitations did not bar this suit. Case law to the contrary has been overruled by the Supreme Court.

Respondents claimed that Appellants' petition should be dismissed because the general partner that signed it was not an attorney, and thus his action in signing and filing it was a nullity because he was practicing law (If pages 12-13, 24-25, 30-31, 43-46, 48-51). Section 484.020.1, RSMo prohibits partnerships from practicing law. It is not clear why the trial court treated the petition as a nullity. If it was because the trial court found that the actions of the general partner amounted to practicing law, then the trial court erred. Hensel v. American Air Network, Inc., supra at page 583, had similar facts as this case. There the petition was prepared by an attorney, but not a licensed Missouri attorney. It was then filed, but not signed, by a Missouri attorney. Timely action was taken to assure proper representation. The Supreme Court refused to dismiss the case, and it ruled that the filing was not a nullity (Hensel, at 583). In the instant case, the partnerships, through their general partner, employed a law firm. None of the pleadings were prepared by the general partner. He followed instructions of the law firm in signing and filing the petition, and he was advised that he had little time to file before a statute of limitations would run (If, pages 56-57). If "the only issue of unauthorized practice is the signature on the petition required by Rule 55.03, the sanction of depriving the litigant of a cause of action is disproportionate to the harm." Id. at 583. Because of a footnote in Hensel, page 584,

Respondents argued to the trial court that corporations should be treated differently, and that partnerships were like corporations (lf, page 49). The case relied on by Respondents was Reed v. Labor and Industrial Relations Commission, 789 S.W 2d 19, 23, (Mo.banc 1990), standing for the proposition that "it is axiomatic that a corporation must act through an attorney in all legal matters." The Court in Reed distinguished corporations from natural persons as to what types of representation amounted to practicing law. Assuming partnerships should be treated like corporations, the actions of John Dilks in signing the petition in this case do not amount to practicing law. He did not attempt to exercise any degree of legal skill or knowledge. He simply followed the advice and instructions of a lawyer (lf, pages 56-57). The holding in Reed has been severely restricted, if not reversed, by the decision of the Supreme Court in Haggard v. Division Of Employment Security, 238 S.W.3d 151 (Mo.banc 2007). The Court there stated, "To the extent that Reed suggests that a judgment is null and void solely because a party to the decision was represented by a non-lawyer, it is no longer to be followed...[R]epresentation by one not authorized to practice law is not jurisdictional ...."Haggard, pages 155-156. For the foregoing reasons the actions of John Dilks did not amount to the practice of law and were not jurisdictional.

Appellants will address some cases mentioned by Respondents at the trial level. Joseph Sansone Co. v. Bay View Golf Course, 97 S.W.3d 531 (Mo App. E.D. 2003), was cited for the principle that "the normal effect of a representative's unauthorized practice of law is to dismiss the cause or treat the particular actions taken by the representative as a nullity (Id. at 532). That issue is resolved by the Hensel case, supra, which indicates that merely signing the petition, as in this case, is not practicing law.

Stamatiou v. El Greco Studios, 935 S.W.2d 701 (Mo App.W.D. 1996), involved a motion to vacate a judgment. The motion was signed by a non-attorney. The Court of Appeals, apparently on its own, held that the motion to vacate was not properly before the court and dismissed the appeal (id 702). However, the Court of Appeals relied on Reed, supra. We have already seen that Reed is no longer the authority for the proposition that a judgment is null and void because a party to a judgment was represented by a non-lawyer. Haggard, supra at 155.

Schenberg v. Bitzmart, Inc., 178 S.W.3d 543 (Mo.App.E.D. 2005), held that where a non-attorney filed post trial motions on behalf of a corporation, the motions were not timely filed, because the representative who filed them was practicing law and his actions were a nullity (id 544). Schenberg relied on Reed and Sansone, and those cases, as we have shown, no longer provide a bright line test. Further, in Schenberg the unauthorized representative was warned and aware that an attorney was needed for the corporation, and he failed to take any steps to correct the improper signing. He clearly did much more in the way of representing his corporate party than John Dilks did by merely signing a petition.

In 6226 Northwood Condominium Association v. Dwyer, 330 S.W.3d 504 (Mo.App. 2010), an appeal was dismissed by the Supreme Court. There the plaintiff, a condominium association, had represented itself through a non-attorney condo official. When the issue was called to its attention, the condo association proceeded without counsel, and the trial court agreed that this action was proper. Under those facts, the condo association, a corporation, was clearly practicing law, and the trial court did not sanction it for doing so. Notably, the condo association did not request a chance to have an attorney in the lower court. The case does not assist Respondents.

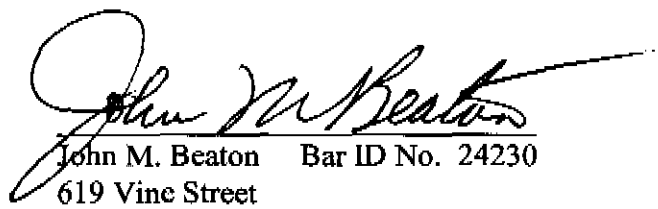
CONCLUSION

The trial court should have given Appellants a chance to correct the petition by having it signed by an attorney or allowing their amended petition, signed by an attorney, to be filed, because the lack of a proper signature did not make the filing a nullity. Appellants sought to correct the omission promptly. The sanction of dismissing the petition disproportionate to the harm. The trial court did not lose jurisdiction and should have allowed the filing of Plaintiffs First Amended Petition and found that it related back to the date of filing of the original petition.

The trial court should have found that the general partner of Appellants was not practicing law, under the facts of this case, when he signed the petition, and thus the petition was not a nullity and was timely filed.

The Court of Appeals should remand the case to the trial court with instructions to allow Appellants to file any amended petition desired within a reasonable time, and to order that such petition, if properly signed and filed, relates back to the date of filing of the original petition.

Respectfully submitted,



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CERTIFICATE

The undersigned certifies that the Appellant's brief filed herewith (1) includes the information required by Rule 55.03 (2) complies with the limitations contained in Rule 84.06 (b); (3) contains 3,289 words; (4) that he signed the original.

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